93-981

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1993

UNITED STATES OF AMERICA, PETITIONER

v.

RESHAT SHABANI

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether, to establish a violation of the drug conspiracy statute, 21 U.S.C. 846, the government must prove an overt act in furtherance of the conspiracy.

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RESHAT SHABANI

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-9a) is reported at 993 F.2d 1419.

JURISDICTION

The judgment of the court of appeals was entered on May 17, 1993. A petition for rehearing was denied on September 22, 1993. App., *infra*, 10a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 846 of Title 21 provides:

> Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT

After a jury trial in the United States District Court for the District of Alaska, respondent was convicted on one count of conspiring to distribute cocaine, in violation of 21 U.S.C. 846. He was sentenced to 160 months' imprisonment, to be followed by 60 months' supervised release. The court of appeals reversed. App., *infra*, 1a-9a.

1. On August 29, 1990, a federal grand jury in the District of Alaska returned a one-count indictment charging that between March 7 and March 25, 1990, respondent conspired with Pamela Mayfield, Dzemail Pinjoli, and others to distribute cocaine. C.A. Supp. Excerpt of Record 1-2.[1] The indictment did not allege that any overt act had been committed in furtherance of the conspiracy. App., *infra*, 2a. Before trial, respondent moved to dismiss the indictment on the ground that the government was

[1] Separate indictments were returned charging Mayfield and Pinjoli with drug trafficking offenses and carrying a firearm during and in relation to a drug trafficking offense. Mayfield pleaded guilty to the charges and testified at respondent's trial pursuant to a plea agreement. After a trial on the charges against him, Pinjoli was convicted of distributing cocaine but acquitted on the firearm charge. Gov't C.A. Br. 7-8 & n.4.

required to allege the commission of an overt act. *Ibid.* The district court denied the motion. *Ibid.*

The evidence at respondent's trial showed that in March 1990, respondent arranged for three shipments of cocaine, totaling approximately five kilograms, to be brought from California to Anchorage, Alaska. Upon the arrival of each shipment, respondent worked together with Mayfield and Pinjoli to separate the cocaine into smaller quantities, which they sold to Mayfield's friends and acquaintances, among others. Respondent, Mayfield, and Pinjoli divided the proceeds of the sales. Gov't C.A. Br. 2-8.

At the close of the evidence, respondent asked the district court to instruct the jury that the government was required to prove beyond a reasonable doubt that an overt act had been committed in furtherance of the conspiracy. App., *infra*, 3a. The court declined to give that instruction. *Ibid.*[2]

[2] The district court's instruction to the jury on the elements of 21 U.S.C. 846 was as follows (C.A. Supp. Excerpts of Record 1-2):

> The defendant is charged in the indictment with conspiring to distribute cocaine in violation of Title 21, United States Code, Section 846. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:
>
> *First*: beginning on or about March 7, 1990, and continuing until on or about March 25, 1990, there was an agreement between two or more persons to distribute cocaine in violation of 21 U.S.C. § 841(a)(1); and
>
> *Second*: the defendant became a member of the conspiracy knowing of at least one of its objects and intending to help accomplish it.

2. The court of appeals reversed respondent's conviction. App., *infra*, 1a-9a. It held, first, that the district court erred in failing to instruct the jury that the government was required to prove an overt act in furtherance of the conspiracy. In so holding, the court of appeals emphasized that it was "bound by [the Ninth Circuit's] previous decisions," which the court read to require the government in a prosecution under 21 U.S.C. 846 to prove an overt act in furtherance of the conspiracy at trial, even though the government is not required to allege an overt act in the indictment. App., *infra*, 5a. The court "s[aw] merit," however, "in the government's argument that [the Ninth Circuit's] recent cases requiring proof of an overt act stand on weak ground." *Id.* at 4a. The court explained that "[t]he omission of overt act language from the text of 21 U.S.C. § 846 suggests that Congress * * * established a distinct definition of conspiracy for narcotics crimes, one that does not require an overt act." App., *infra*, 4a. Moreover, the court observed that in construing other conspiracy statutes that contain no express overt act requirement, the Ninth Circuit "ha[s] held that proof of an overt act is unnecessary." *Ibid.* The court added: "So has the Supreme Court." *Ibid.*, citing *Singer* v. *United States*, 323 U.S. 338 (1945). In addition, the court of appeals recognized that "every other circuit holds that proof of an overt act is not necessary" in a prosecution under Section 846. App., *infra*, 4a; see also *id.* at 4a n.1 (citing cases).

The court of appeals acknowledged that "[t]he jurors heard testimony about overt acts." App., *infra*, 7a. It determined, however, that because respondent was charged only with drug conspiracy, and not with any substantive drug offenses, "the

jurors did not have to find an overt act or its functional equivalent." *Id.* at 8a. The court therefore concluded that the district court's failure to instruct on the overt act requirement was not harmless error.[3]

Chief Judge Wallace concurred in a separate opinion. App., *infra*, 9a. He observed that there is "a complete lack of textual support" in 21 U.S.C. 846 for requiring proof of an overt act. App., *infra*, 9a. He urged the Ninth Circuit to "take this issue en banc and to align itself with every other court of appeals." *Ibid.*

3. The government filed a petition for rehearing with a suggestion of rehearing en banc. The petition was denied, with only Judge Wallace voting in favor of rehearing en banc. App., *infra*, 10a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit plainly erred in holding that the drug conspiracy statute, 21 U.S.C. 846, requires proof of an overt act in furtherance of the conspiracy. That holding cannot be squared with the text of the statute, which contains no overt act requirement. Moreover, the holding conflicts with decisions of this Court holding that a criminal conspiracy statute that does not contain an express overt act requirement does not require proof of an overt act. Finally, the decision in this case conflicts with decisions of 11 other circuits holding that 21 U.S.C. 846 does not require proof of an overt act. This Court's review is warranted.

1. a. The Ninth Circuit's holding is at odds with the plain language of the drug conspiracy statute,

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[3] We do not seek further review of the court of appeals' holding regarding harmless error.

21 U.S.C. 846. The statute provides in pertinent part that "[a]ny person who * * * conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the * * * conspiracy." As the Ninth Circuit observed in this case, "[t]he plain language of 21 U.S.C. § 846, in contrast to the general conspiracy statute, 18 U.S.C. § 371, does not mention an overt act." App., *infra*, 4a.[4] Thus, as Chief Judge Wallace observed in his concurring opinion in this case, there is a "complete lack of textual support in the statute" for the Ninth Circuit's holding that 21 U.S.C. 846 requires proof of an overt act in furtherance of the conspiracy. App., *infra*, 9a. See also *United States* v. *Felix*, 112 S. Ct. 1377, 1386 (1992) (Stevens, J., concurring) ("there is no overt act requirement in the federal drug conspiracy statute").

The absence of an express overt act requirement in the drug conspiracy statute is dispositive of the question whether the government must prove an overt

[4] The general conspiracy statute, 18 U.S.C. 371, provides in pertinent part (emphasis added):

> If two or more persons conspire * * * to commit any offense against the United States, * * * *and one or more of such persons do any act to effect the object of the conspiracy*, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Congress first enacted a general conspiracy statute in 1867; it was codified as Section 5440 of the Revised Statutes (1873-1874) and later as Section 37 of the Criminal Code. Act of Mar. 4, 1909, ch. 321, § 37, 35 Stat. 1096. The language of the early versions of the general conspiracy statute is substantially identical to the language of the current version codified at 18 U.S.C. 371.

act in prosecutions under that statute. The answer is no. As this Court has repeatedly stated, "where, as here, the statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States* v. *Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917)). The plain language of Section 846 shows that proof of an overt act is not required in prosecutions under that provision.

b. The Ninth Circuit's holding also conflicts with this Court's decisions in *Singer* v. *United States*, 323 U.S. 338 (1945), and *Nash* v. *United States*, 229 U.S. 373 (1913). Those decisions make clear that a criminal conspiracy statute that does not contain an express overt act requirement does not require proof of an overt act.

In *Nash*, the Court rejected a defendant's claim that an indictment charging conspiracies to violate the Sherman Act was invalid because "no overt act is laid." 229 U.S. at 378. The answer to that claim, the Court stated, "is that the Sherman Act punishes the conspiracies at which it is aimed on the common law footing—that is to say, it does not make the doing of any act other than the act of conspiring a condition of liability." *Ibid.* The Sherman Act did not contain an express overt act requirement. The Court in *Nash* accordingly distinguished its decisions construing the general conspiracy statute, which did contain an express overt act requirement. Decisions interpreting the general conspiracy statute, the Court explained, "have no bearing upon a statute that does not contain [an overt act] requirement." *Ibid.*[5]

[5] In decisions arising under the predecessors to Section 371, the Court made clear that courts may require proof of an

The question in *Singer* was whether an indictment charging the defendant with conspiring to evade the draft was sufficient in the absence of an allegation of an overt act. 323 U.S. at 339. The answer to that question depended on whether the conspiracy was punishable under Section 11 of the Selective Training and Service Act of 1940, ch. 720, 54 Stat. 894-895, which did not contain an express overt act requirement, or was instead punishable only under the general criminal conspiracy statute (a predecessor of 18 U.S.C. 371), which did contain an express overt act requirement. 323 U.S. at 339-340. The Court held that the offense was punishable under Section 11 and that the indictment was therefore sufficient despite the absence of an allegation of an overt act. In so holding, the Court observed that Section 11 "does not require an overt act for the offense of conspiracy." *Id.* at 340.

Thus, as the Seventh Circuit recently stated, "*Nash* and *Singer* gave Congress a formulary: by choosing a text modeled on § 371, it gets an overt act require-

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overt act only under statutes that contain an express overt act requirement, because that requirement is in derogation of the common law. In *Hyde* v. *United States*, 225 U.S. 347, 359 (1912), for example, the Court explained that "at common law it was not necessary to aver or prove an overt act; but § 5440 [a predecessor to Section 371] has gone beyond such rigid abstraction and prescribes, as necessary to the offense, not only the unlawful conspiracy, but that one or more of the parties must do an 'act to effect' its object." See also, *e.g.*, *United States* v. *Rabinowich*, 238 U.S. 78, 86 (1915) ("a mere conspiracy, without overt act done in pursuance of it, is not criminally punishable" under the general conspiracy statute); *Hyde* v. *Shine*, 199 U.S. 62, 76 (1905).

ment; by choosing a text modeled on the Sherman Act, 15 U.S.C. § 1, it dispenses with such a requirement." *United States* v. *Sassi*, 966 F.2d 283, 284 (7th Cir.), cert. denied, 113 S. Ct. 509 (1992). Under *Nash* and *Singer*, because Section 846 does not contain an express overt act requirement, it does not require proof of an overt act.

c. In addition to conflicting with the plain language of Section 846 and with this Court's decisions in *Nash* and *Singer*, the Ninth Circuit's decision violates the well-established principle that statutes must be construed to adopt the common law meaning of legal terms unless a contrary purpose is evident. See, *e.g.*, *Astoria Federal Sav. & Loan Ass'n* v. *Solimino*, 111 S. Ct. 2166, 2169-2170 (1991).[6] As the Court recognized in *Nash* and *Singer*, a common law conspiracy did not require proof of an overt act. *Nash*, 229 U.S. at 378; *Singer*, 323 U.S. at 340.[7] Congress's omission of an express overt act requirement from Section 846 thus provides compelling evidence that it intended to punish drug conspiracies

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[6] See also *Moskal* v. *United States*, 498 U.S. 103, 114 (1990); *United States* v. *Turley*, 352 U.S. 407, 411 (1957)); *Isbrandtsen Co.* v. *Johnson*, 343 U.S. 779, 783 (1952); *Morissette* v. *United States*, 342 U.S. 246, 263 (1952).

[7] See also *Hogan* v. *O'Neill*, 255 U.S. 52, 55 (1921); *Hyde* v. *United States*, 225 U.S. at 359; *Hyde* v. *Shine*, 199 U.S. at 76; *Bannon & Mulkey* v. *United States*, 156 U.S. 464, 468 (1895); *United States* v. *Hirsch*, 100 U.S. 33, 34 (1879); *United States* v. *Walsh*, 28 F. Cas. 394, 395 (E.D. Mo. 1878) (No. 16,636); 2 W. LaFave & A. Scott, Jr., *Substantive Criminal Law* § 6.5(c), at 93-94 (1986); *Developments in the Law —Criminal Conspiracy*, 72 Harv. L. Rev. 920, 923 (1959); B.F. Pollack, *Common Law Conspiracy*, 35 Geo. L.J. 328, 338 (1947).

"on the common law footing." *Singer*, 323 U.S. at 340 (quoting *Nash*, 229 U.S. at 378).

There is no contrary evidence in the legislative history of Section 846 or earlier statutes proscribing drug conspiracies. The earliest provision proscribing drug conspiracies was enacted in 1951, in a provision concerning conspiracies to traffic in narcotic drugs. See Act of Nov. 2, 1951, ch. 666, § 1, 65 Stat. 767. A similar provision proscribing conspiracies to traffic in marijuana was enacted in 1956. Act of July 18, 1956, ch. 629, Tit. I, § 106, 70 Stat. 570. Neither of those provisions, codified as 21 U.S.C. 174 and 176a (1958), contained an express overt act requirement. Moreover, nothing in the legislative history of those provisions suggested that Congress intended to require proof of an overt act. Courts interpreting those provisions accordingly held that no such proof was required. See *United States* v. *Gardner*, 202 F. Supp. 256, 258-259 (N.D. Cal. 1962); see also *Leyvas* v. *United States*, 371 F.2d 714, 717 & n.4 (9th Cir. 1967) (adopting the reasoning in *Gardner*); *United States* v. *Garfoli*, 324 F.2d 909, 910 (7th Cir. 1963).

The current drug conspiracy statute, 21 U.S.C. 846, was enacted as part of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 406, 84 Stat. 1265. The legislative history of the new statute contained no suggestion that Congress intended to adopt an overt act requirement for drug conspiracies that was absent in the predecessor statute. And the purpose of the 1970 legislation—to enhance the tools for prosecuting serious drug offenses—would be contrary to an unspoken intention to add a new element to the drug conspiracy

offense. See *United States* v. *Bey*, 736 F.2d 891, 894 (3d Cir. 1984); *United States* v. *De Viteri*, 350 F. Supp. 550, 552 (E.D.N.Y. 1972); *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920, 948-949 (1959) ("There seems little reason to require proof of a substantial overt act in * * * any conspiracy to trade in narcotics."). The Ninth Circuit thus departed from both the common law of conspiracy and the prevailing rule under the predecessor drug conspiracy statutes, without any support in the text, the legislative history, or the purposes of Section 846.

d. The Ninth Circuit's decision rests, ultimately, on a misreading of two of this Court's precedents. In a case dealing with the predecessor to Section 846, the Ninth Circuit stated in passing that the statute required proof of an overt act. See *United States* v. *Thompson*, 493 F.2d 305, 310, cert. denied, 419 U.S. 834 (1974). For that proposition, the court cited *United States* v. *Rabinowich*, 238 U.S. 78 (1915). *Rabinowich*, however, did not support the court's construction of the drug conspiracy statute.

Rabinowich concerned Section 5440 of the Revised Statutes (1873-1974), a predecessor of 18 U.S.C. 371. As noted, the Court in *Nash* stated that decisions interpreting Section 5540 "have no bearing upon a statute that does not contain the [overt act] requirement found in [Section 5440]." 229 U.S. at 378. The Court in *Singer* similarly indicated that decisions construing Section 5440 do not guide the interpretation of statutes that do not contain an express overt act requirement. The Court in *Singer* cited *Rabinowich* for the proposition that proof of an overt act was required if the offense was punish-

able under Section 37 of the Criminal Code (an immediate predecessor of Section 371), which did contain an express overt act requirement, see *Singer*, 323 U.S. at 340, but it cited *Nash* for the proposition that proof of an overt act was not required if the offense was punishable instead under a statute that did not contain an express overt act requirement, see *Singer*, 323 U.S. at 340. Thus, *Nash* and *Singer* make clear that *Rabinowich* is inapplicable to statutes, such as 21 U.S.C. 846, that do not contain an express overt act requirement.

The Ninth Circuit made a similar error in *United States* v. *Monroe*, 552 F.2d 860, 864, cert. denied, 431 U.S. 972 (1977). There, the court cited *United States* v. *Feola*, 420 U.S. 671 (1975), in support of the proposition that Section 846 requires proof of an overt act. Like *Rabinowich*, however, *Feola* involved the general conspiracy statute, not Section 846 or any other conspiracy statute that lacks an express overt act requirement.

In each case, the reference to the overt act requirement appears to have been the product of an assumption that the law of conspiracy is consistent throughout, and a lack of attention to the differences among conspiracy statutes. Certainly there is no basis in the decisions of this Court on which the Ninth Circuit relied to support the rule it has adopted with respect to Section 846; in sum, the Ninth Circuit significantly understated the matter when it characterized its prior decisions construing Section 846 to require proof of an overt act as resting on "weak ground." App., *infra*, 4a.

2. The Ninth Circuit's error calls for correction by this Court for three reasons.

First, the Ninth Circuit's decision conflicts with the governing rule in 11 other circuits. As the Ninth Circuit itself recognized (App., *infra*, 4a), every circuit with criminal jurisdiction except the Ninth Circuit has held that 21 U.S.C. 846 does not require proof of an overt act.[8] The other circuits have adopted that rule as the necessary logical extension of *Nash* and *Singer*. See, *e.g.*, *United States* v. *Sassi*, 966 F.2d 283, 285 (7th Cir.), cert. denied,

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[8] See, *e.g.*, *United States* v. *Pumphrey*, 831 F.2d 307, 308-309 (D.C. Cir. 1987); *United States* v. *Paiva*, 892 F.2d 148, 155 (1st Cir. 1989); *United States* v. *Knuckles*, 581 F.2d 305, 311 (2d Cir.), cert. denied, 439 U.S. 986 (1978); *United States* v. *Bey*, 736 F.2d at 895; *United States* v. *Dreyer*, 533 F.2d 112, 117 (3d Cir. 1976); *United States* v. *Clark*, 928 F.2d 639, 641 (4th Cir. 1991); *United States* v. *Onick*, 889 F.2d 1425, 1432 (5th Cir. 1989); *United States* v. *Brown*, 692 F.2d 345, 348 (5th Cir. 1982); *Cacace* v. *United States*, 590 F.2d 1339, 1340 (5th Cir. 1979) (per curiam) (habeas case); *United States* v. *Christian*, 786 F.2d 203, 211 (6th Cir. 1986); *United States* v. *Dempsey*, 733 F.2d 392, 394-396 (6th Cir.), cert. denied, 469 U.S. 983 (1984); *United States* v. *Sassi*, 966 F.2d at 284-285; *United States* v. *Brock*, 782 F.2d 1442, 1444 (7th Cir. 1986); *United States* v. *Figueroa*, 900 F.2d 1211, 1218 (8th Cir.), cert. denied, 496 U.S. 942 (1990); *United States* v. *Savaiano*, 843 F.2d 1280, 1294 (10th Cir.), cert. denied, 488 U.S. 836 (1988); *United States* v. *Alberti*, 727 F.2d 1055, 1060 (11th Cir.), cert. denied, 469 U.S. 852 (1984); *United States* v. *Cochran*, 883 F.2d 1012, 1017 (11th Cir. 1989); *United States* v. *Noe*, 821 F.2d 604, 609 n.7 (11th Cir. 1987). On occasion, some courts of appeals have suggested in passing that proof of an overt act is an element of Section 846. See, *e.g.*, *United States* v. *Gonzalez*, 810 F.2d 1538, 1544 (11th Cir. 1987); *United States* v. *Hutchinson*, 488 F.2d 484, 490 (8th Cir. 1973), cert. denied, 417 U.S. 915 (1974). But in every case in which a court of appeals has given plenary consideration to the issue, it has concluded that the statute contains no such requirement.

113 S. Ct. 509 (1992); *United States* v. *Covos*, 872 F.2d 805, 810 (8th Cir.), cert. denied, 493 U.S. 840 (1989); *United States* v. *Pumphrey*, 831 F.2d 307, 309 (D.C. Cir. 1987); *United States* v. *Bey*, 736 F.2d 891, 894 (3d Cir. 1984); *United States* v. *Dempsey*, 733 F.2d 392, 395 (6th Cir.), cert. denied, 469 U.S. 983 (1984).

Second, the question presented here is an important and recurring one. The question whether proof of an overt act is required under 21 U.S.C. 846 arises in every trial under that statute. Moreover, the Ninth Circuit's analysis, if applied beyond the immediate setting of Section 846, would call into question the construction of a large number of important criminal conspiracy statutes that contain no express overt act requirement.[9] Those statutes include the civil rights conspiracy statute, 18 U.S.C. 241; the false claims conspiracy statute, 18 U.S.C. 286; the extortionate extension of credit statutes, 18 U.S.C. 892 and 894; the Hobbs Act, 18 U.S.C. 1951; the RICO conspiracy statute, 18 U.S.C. 1962(d); the drug importation conspiracy statute, 21 U.S.C. 963; the voting rights conspiracy statutes, 42 U.S.C. 1973i(c) and 1973j(c); and the maritime drug conspiracy statute, 46 U.S.C. App. 1903(j). Accordingly, this Court's review is necessary not only to bring consistency to the construction of Section 846, but to settle any doubts that the Ninth Circuit's analysis may raise about the proper construction of the large number of similar conspiracy statutes in the United States Code.

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[9] Of the more than 80 federal criminal conspiracy statutes, only 21 contain an express overt act requirement.

Finally, the Ninth Circuit has made clear that it will not correct its own error. Both the majority and the concurring opinions below criticized the Ninth Circuit's position that 21 U.S.C. 846 requires proof of an overt act. See pp. 4-5, *supra*. In addition, the majority recognized that the Ninth Circuit's position conflicts with decisions in every other circuit and cannot be reconciled with some of the Ninth Circuit's own decisions on closely related statutes.[10] In his concurring opinion, moreover, Chief Judge Wallace urged the full court "to take this issue en banc and to align itself with every other court of appeals." App., *infra*, 9a. Under these circumstances, the Ninth Circuit's denial of en banc review, with only Chief Judge Wallace dissenting, indicates that review by this Court is necessary to correct the Ninth Circuit's error.

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[10] In three decisions interpreting the predecessor statutes to Section 846, the Ninth Circuit stated that the drug conspiracy statute did not require proof of an overt act. See *Hopkins* v. *United States*, 405 F.2d 770, 772 n.2 (9th Cir. 1969); *Ewing* v. *United States*, 386 F.2d 10, 15 (9th Cir. 1967), cert. denied, 390 U.S. 991 (1968); *Leyvas* v. *United States*, 371 F.2d 714, 717 (9th Cir. 1967). And the Ninth Circuit has refused to read an overt act requirement into 18 U.S.C. 241, the civil rights conspiracy statute, even though that statute, like Section 846, contains no express overt act requirement. See *United States* v. *Skillman*, 922 F.2d 1370, 1375-1376 (9th Cir. 1990), cert. dismissed, 112 S. Ct. 353 (1991).

CONCLUSION

The petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

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DECEMBER 1993

APPENDIX A

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 91-30224

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RESHAT SHABANI, a/k/a LEE SHABANI,
DEFENDANT-APPELLANT

Appeal from the United States District Court
for the District of Alaska

Argued and Submitted Dec. 8, 1992
Decided May 17, 1993

Before: WALLACE, Chief Judge, WRIGHT and LEAVY, Circuit Judges.

EUGENE A. WRIGHT, Circuit Judge:

Shabani appeals his conviction of conspiracy to distribute cocaine in violation of 21 U.S.C. § 846. He argues that the government failed to plead or prove

an essential element of the crime. The indictment did not allege that an overt act was committed to further the conspiracy. In defining the offense, the jury instructions also omitted mention of an overt act. We conclude that the indictment was legally sufficient but hold that the district court erred in not instructing the jury on the requirement of an overt act. The jury was precluded from finding all the elements necessary to convict. We must reverse.

I

The government alleged that Shabani moved to Alaska and entered into a drug distribution scheme with his girlfriend, her family and their associates. According to the prosecution, Shabani was the supplier arranging to have the cocaine brought to Anchorage from California. The girlfriend, Mayfield, and another friend, Pinjoli, handled the distribution, making many of the sales to Mayfield's relatives. FBI agents purchased drugs from the coconspirators during an undercover investigation. Mayfield pleaded guilty and agreed to cooperate with the prosecution.

Shabani stood trial alone, charged with conspiracy to distribute cocaine. He moved to dismiss the indictment for failing to allege an essential element of the crime, the commission of an overt act. The district court denied the motion.

His defense at trial focused on the lack of direct evidence linking him to any of the drug sales. The major witnesses included Mayfield and her relatives, all of whom testified pursuant to plea agreements. Shabani suggested that they had concocted a story about his involvement to gain lenient treatment from the federal prosecutor.

Before the case went to the jury, Shabani again raised the overt act issue, requesting that the court modify the jury instructions to mention that proof of an overt act was necessary to convict. The court declined to do so. The jury returned a guilty verdict. The court sentenced Shabani to 160 months imprisonment, followed by a 60-month term of supervised release unless deported.

II

A. Failure to include overt act in the indictment

The parties alert us to an apparent conflict in this circuit as to whether an overt act must be proved or alleged to sustain a drug conspiracy conviction. Our recent cases restate consistently that proof of a Section 846 violation requires (1) an agreement, (2) to engage in criminal activity, and (3) one or more overt acts in furtherance of the conspiracy. *See, e.g., United States v. Garza*, 980 F.2d 546, 554 (9th Cir. 1992); *United States v. Navarro*, 979 F.2d 786, 789 (9th Cir.1992); *United States v. Vasquez-Chan*, 978 F.2d 546, 553 (9th Cir.1992); *United States v. Smith*, 924 F.2d 889, 894 n. 1 (9th Cir.1991); *United States v. Magana-Olvera*, 917 F.2d 401, 409 (9th Cir.1990). The Ninth Circuit Model Jury Instructions also mention an overt act as one of the elements. Ninth Cir.Crim.Jury Inst., 8.05A.

Yet, language in *United States v. McCown*, 711 F.2d 1441 (9th Cir.1983) and *United States v. Tavelman*, 650 F.2d 1133 (9th Cir. 1981), *cert. denied*, 455 U.S. 939, 102 S.Ct. 1429, 71 L.Ed.2d 649 (1982), suggests that

> [a]n indictment under 21 U.S.C. § 846 is sufficient if it alleges: a conspiracy to distribute

> drugs, the time during which the conspiracy was operative and the statute allegedly violated, *even if it fails to allege or prove any specific overt act in furtherance of the conspiracy.* (emphasis added)

McCown, id. at 1450 (quoting *Tavelman, id.* at 1137).

We see merit in the government's argument that our recent cases requiring proof of an overt act stand on weak ground. The plain language of 21 U.S.C. § 846, in contrast to the general conspiracy statute, 18 U.S.C. § 371, does not mention an overt act. When we have interpreted other conspiracy statutes that are silent on the subject, we have held that proof of an overt act is unnecessary. *See, e.g., United States v. Skillman*, 922 F.2d 1370, 1375 (9th Cir.1990) (conspiracy to deprive another of civil rights in violation of 18 U.S.C. § 241), *cert. dismissed*, —— U.S. ——, 112 S.Ct. 353, 116 L.Ed.2d 275 (1991). So has the Supreme Court. *See, e.g., Singer v. United States*, 323 U.S. 338, 65 S.Ct. 282, 89 L.Ed. 285 (1945) (Selective Service Act).

The omission of overt act language from the text of 21 U.S.C. § 846 suggests that Congress, in enacting the Controlled Substances Act, established a distinct definition of conspiracy for narcotics crimes, one that does not require an overt act. *See United States v. Pumphrey*, 831 F.2d 307, 308-09 (D.C.Cir. 1987). For these reasons, every other circuit holds that proof of an overt act is not necessary.[1]

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[1] *See United States v. Sassi*, 966 F.2d 283, 285 (7th Cir.), *cert. denied*, —— U.S. ——, 113 S.Ct. 509, 121 L.Ed.2d 444 (1992); *United States v. Clark*, 928 F.2d 639, 641 (4th Cir. 1991); *United States v. Covos*, 872 F.2d 805, 810 (8th Cir.), *cert. denied*, 493 U.S. 840, 110 S.Ct. 124, 107 L.Ed.2d 85 (1989); *United States v. Savaiano*, 843 F.2d 1280, 1294 (10th Cir.), *cert. denied*, 488 U.S. 836, 109 S.Ct. 99, 102 L.Ed.2d 74 (1988); *United States v. Pumphrey*, 831 F.2d 307, 308-09 (D.C.Cir. 1987); *United States v. Christian*, 786 F.2d 203, 211 (6th Cir. 1986); *United States v. Bey*, 736 F.2d 891, 895 (3d Cir. 1984); *United States v. Alberti*, 727 F.2d 1055, 1060 (11th Cir.), *cert. denied*, 469 U.S. 862, 105 S.Ct. 199, 83 L.Ed.2d 131 (1984); *United States v. Lee*, 622 F.2d 787, 790 (5th Cir. 1980), *cert. denied*, 451 U.S. 913, 101 S.Ct. 1987, 68 L.Ed.2d 303 (1981); *United States v. Knuckles*, 581 F.2d 305, 311 (2d Cir.), *cert. denied*, 439 U.S. 986, 99 S.Ct. 581, 58 L.Ed.2d 659 (1978); *United States v. DeJesus*, 520 F.2d 298, 301 (1st Cir.), *cert. denied*, 423 U.S. 865, 96 S.Ct. 126, 46 L.Ed.2d 94 (1975).

Clearly, the district court believed that this circuit should abandon its minority approach. In declining to follow the authority requiring proof of an overt act, Judge Holland made a fair attempt at resolving our confusing circuit law. He reached this decision "with considerable reluctance and a lot of caution," inviting counsel to appeal so that we might review the question thoroughly.

We understand the district court's frustration with seemingly contradictory opinions, as well as its desire to avoid a conflict with persuasive authority from all the other circuits. Nevertheless, as a three-judge panel, we are bound by this court's previous decisions. *United States v. Washington*, 872 F.2d 874, 880 (9th Cir.1989). We must attempt to resolve the tension in our case law. Only if the cases prove irreconcilable must we call for en banc review. *United States v. Hardesty*, 977 F.2d 1347, 1348 (9th Cir.1992) (en banc), *cert. denied*, —— U.S. ——, 113 S.Ct. 1429, 122 L.Ed.2d 797 (1993).

We do not believe that *McCown* controls the issue we must decide today. In *McCown*, the appellants challenged that an indictment was defective because

it "fail[ed] to state with specificity the time during which the conspiracy was operative." 711 F.2d at 1450. We ruled that the indictment gave sufficiently specific beginning and ending dates. The overt act issue played no part in *McCown's* central holding. The language that it was unnecessary to include an overt act in the indictment was dictum that we need not follow.[2]

The issue of overt acts played a more critical part in *Tavelman*. The appellants directly challenged their indictments as constitutionally defective because of failure "to allege specific facts or overt acts." 650 F.2d at 1137. They were indicted on two counts. Count One alleged a cocaine conspiracy. Count Two alleged that the appellants violated the Travel Act by performing interstate acts in furtherance of the intent to distribute cocaine. We held that the indictments were sufficient even though they failed to allege an overt act for the conspiracy charge.

A narrow reading of the case suggests that this was because Count Two supplied the missing overt act. The appellants had conceded that "the existence of a substantive count may substitute for a definite statement fo essential facts or overt acts." *Id.* Yet *Tavelman* indicated no such restrictions on its holding. It relied on the general proposition that "[c]ourts do not require as detailed a statement of an offense's elements under a conspiracy count as under a substantive count." *Id.* Its statement about indictments being sufficient even though omitting overt acts sweeps broadly.

[2] Indeed, we are puzzled by how the court arrived at this conclusion. Both *McCown* and *Tavelman* cite to an out-of-circuit case, *United States v. Marable*, 578 F.2d 151, 154 (5th Cir. 1978), *overruled on other grounds, United States v. Rodriguez*, 612 F.2d 906 (5th Cir. 1980) (en banc), *aff'd*, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981), for the proposition that the indictment need not allege an overt act. But the basis for *Marable's* holding was that the Fifth Circuit, in contrast to this court, does not require that the government even prove an overt act at trial. *Id.*

This does not mean, however, that *Tavelman* conflicts irreconcilably with our other line of cases. It addresses only what the government must allege in an indictment, not what must be proved at trial. Our other cases hold clearly that the government must demonstrate the commission of an overt act to sustain a conviction. We conclude that *Tavelman* excuses any deficiencies in the indictment at issue here.

B. Failure to Instruct on an Overt Act

We review de novo whether the district court's instructions to the jury misstated the elements of a statutory crime. *Garza*, 980 F.2d at 554. Jury instructions omitting an element of the offense are constitutional error. *Martinez v. Borg*, 937 F.2d 422, 424 (9th Cir.1991).

The court erred in declining to modify the jury instructions to include an overt act. As we have indicated, our cases hold clearly that the government must prove this element to sustain a conviction. The jurors heard testimony about overt acts. Witnesses said that Shabani drove a truck at least twice to accept drug deliveries. But the jurors did not necessarily have to rely on this evidence to convict of conspiracy as defined in the jury instructions.

We decline to speculate about how the jury might have weighed this evidence if properly instructed. As a result, we cannot say that the instructional error was harmless. To find harmless error, we would have

to conclude that "no rational jury could have made [its] findings without also finding the omitted or presumed fact to be true." *Id.* at 425. We have deemed omission of the overt act element harmless where the jury's determination of guilt on another substantive count served as the functional equivalent of a finding of an overt act. *See United States v. Garcia*, 988 F.2d 965, 969 (9th Cir.1993); *United States v. Baldwin*, 987 F.2d 1432, 1439 (9th Cir. 1993); *Garza*, 980 F.2d at 554; *United States v. Harrison-Philpot*, 978 F.2d 1520, 1522 (9th Cir. 1992), *cert. denied*, —— U.S. ——, 113 S.Ct. 2392, 124 L.Ed.2d 294 (1993). Yet Shabani's conviction rested on the single conspiracy count. As the case was submitted to them, the jurors did not have to find an overt act or its functional equivalent. They were precluded from finding an element necessary to convict.

III

Because we find instructional error, we do not reach the sufficiency of the evidence, nor do we address the other issues raised on appeal. We conclude that the district court's failure to instruct on an overt act prevented the jury from finding an element necessary to convict Shabani of conspiracy under 21 U.S.C. § 846. We reverse and remand.

REVERSED AND REMANDED.

WALLACE, Chief Judge, concurring:

In light of our holding that the indictment in this case was sufficient despite failing to allege an overt act, our conclusion that the district court erred in failing to instruct the jury that the government was required to prove the commission of an overt act may seem rather odd. Indeed, I am aware of no other circumstance in which the government may refrain from alleging in the indictment an element it must yet prove at trial. Surely, logic as well as jurisprudential consistency would dictate that the indictment must contain all the requisite elements of the offense upon which the district court is required to instruct the jury.

The inconsistency comes about only because our circuit, contrary to every other circuit, clings to a problematic gloss on 21 U.S.C. § 846, insisting, despite a complete lack of textual support in the statute, that in order to convict under this section the government must prove the commission of an overt act in furtherance of the conspiracy. As a three-judge panel, we are bound by our previous holdings which unfortunately lead us to the present strange situation.

While I concur in the majority opinion, I write separately to stress that it makes no sense to continue to demand that the jury be instructed regarding an overt act when it is clear that the indictment need not allege one. Until the court sees fit to take this issue en banc and to align itself with every other court of appeals, we will continue this tiresome, judicially created inconsistency.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-30224

D.C. No. CR-90-63-HRH

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RESHAT SHABANI, a/k/a LEE SHABANI,
DEFENDANT-APPELLANT

ORDER

[Filed Sept. 22, 1993]

Before: WALLACE, Chief Judge, WRIGHT and LEAVY, Circuit Judges.

The panel has voted to deny the petition for rehearing, and Judge Leavy has voted to reject the suggestion for a rehearing en banc. Chief Judge Wallace would accept the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for a rehearing en banc is REJECTED.

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